No. 17-21

IN THE

Supreme Court of the United States

FANE LOZMAN

v.

CITY OF RIVIERA BEACH, FLORIDA

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at the Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

SUMMARY OF ARGUMENT

"The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987). These words resonate in this moment like never before. Outraged by police violence, protesters have taken to the streets. In Ferguson: "Hands up, don't shoot!" In New York: "I can't breathe!" In Chicago: "Sixteen shots!" Across the nation: "No justice, no peace!"

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

The police have long patrolled protests devoted to other matters, from women's suffrage, to Jim Crow, to wars abroad, but now they are called upon to supervise and control a new wave of protests—demonstrations about *themselves*. This new reality creates a new temptation for police to retaliate against protesters, threatening to erode *Hill*'s line between a "free nation" and a "police state." 482 U.S. at 463.

We show in this brief that police departments from Arizona to Maryland have displayed a pattern and practice of arresting people in retaliation for protected expression. Speech that triggers police retaliation takes two principal forms. First, officers retaliate with arrests when protesters direct their outrage at police misconduct. Second, in "contempt of cop" arrests, police retaliate against people who disagree with or criticize them, effectuating full-blown arrests for technical infractions that would normally result in citation and release or no citation at all.

If a person can be arrested for her speech so long as there happens to be probable cause to arrest her for something else, police will have broad discretion to arrest people whose speech they disfavor. It is easy to find a pretext for arrest because statutes and ordinances forbid a wide range of unremarkable human activity—wearing saggy pants, crossing the street while reading a text message, and barbecuing in a front yard.

More specifically, protesters commonly violate an array of statutes and municipal ordinances that prohibit a wide range of activity, such as blocking sidewalks, unlawful assembly, violating noise ordinances, and disorderly conduct. These laws

extend to so much conduct that the police have probable cause to round up large numbers of protesters. Therefore, if probable cause categorically defeats a retaliatory arrest claim, the police will acquire the power to arrest protesters for the very purpose of silencing disfavored messages.

ARGUMENT

I. ILLEGAL ARRESTS FOR DISFAVORED PROTESTS AND "CONTEMPT OF COP" PRESENT A SYSTEMIC PROBLEM IN MANY LAW ENFORCEMENT AGENCIES.

Recent years have witnessed a series of well-documented findings that certain police departments systemically arrest people in retaliation for their speech. Two types of protected speech commonly trigger retaliatory arrests: (1) protests and demonstrations perceived as "anti-police," and (2) "contempt of cop" encounters in which an officer feels slighted or insulted.

In a 2015 report, the Department of Justice found that "suppression of speech" by the Ferguson, Missouri Police Department (FPD) "reflects a police culture that relies on the exercise of police power—however unlawful—to stifle unwelcome criticism." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 28 (2015).[2] The report noted that despite a settlement agreement and a consent decree in two separate cases regarding protest activities, "it appears that FPD continues to interfere with individuals'

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[2] Available athttps://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf

rights to protest and record police activities." *Id.* at 27. For example, on February 15, 2015, the six-month anniversary of the death of Michael Brown, "protesters stood peacefully in the police department's parking lot, on the sidewalks in front of it, and across the street." *Id.* The police responded with retaliatory arrests:

> Video footage shows that two FPD vehicles abruptly accelerated from the police parking lot into the street. An officer announced, "everybody here's going to jail," causing the protesters to run. Video shows that as one man recorded the police arresting others, he was arrested for interfering with police action. Officers pushed him to the ground, began handcuffing him, and announced, "stop resisting or you're going to get tased." It appears from the video, however, that the man was neither interfering nor resisting. A protester in a wheelchair who was live streaming the protest was also arrested. . . . Six people were arrested during this incident. It appears that officers' escalation of this incident was unnecessary and in response to derogatory comments written in chalk on the FPD parking lot asphalt and on a police vehicle.

Id. at 27–28.

Similarly, in 2011, the Department of Justice issued a findings letter regarding the Maricopa County Sheriff's Office (MCSO) in Arizona:

> We find that MCSO command staff and deputies have engaged in a pattern or practice of retaliating against individuals for exercising

> their First Amendment right to free speech. Under the direction of Sheriff Arpaio and other command staff, MCSO deputies have sought to silence individuals who have publicly spoken out and participated in protected demonstrations against the policies and practices of MCSO—often over its immigration policies.

Letter from Thomas E. Perez, Assistant Attorney General, to William R. Jones, Counsel, Maricopa County Sheriff's Office, at 13 (Dec. 15, 2011).[3] For example, during two separate meetings of the County Board of Supervisors, deputies arrested several individuals who expressed criticism of the MCSO. *Id.* at 14. None of them were convicted. *Id.* The Department of Justice concluded: "The arrests and harassment undertaken by MCSO have been authorized at the highest levels of the agency and constitute a pattern of retaliatory actions intended to silence MCSO's critics." *Id.*

The Department of Justice made similar findings regarding the Baltimore Police Department in 2016: "BPD violates the First Amendment by retaliating against individuals engaged in constitutionally protected activities. Officers frequently detain and arrest members of the public for engaging in speech the officers perceive to be critical or disrespectful." DEPARTMENT OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 9 (2016).

A recent preliminary injunction decision issued by the United States District Court for the Eastern

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[3] Available at https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf

District of Missouri analyzes the St. Louis Police Department's response to protests triggered by the acquittal of Officer Jason Stockley for the shooting of Anthony Lamar Smith. *Ahmad v. City of St. Louis*, No. 17-cv-2455, 2017 WL 5478410, at *1 (E.D. Mo. Nov. 15, 2017). These protests, which began on September 15, 2017, were directed at both the verdict and "broader issues, including racism and the use of force by police officers." *Id.* "The participants often express[ed] views critical of police." *Id.*

As the protests continued on Sunday, September 17, there were reports of protesters damaging property, and some protesters put on goggles and masks (likely because of concerns about tear gas or mace). *Id.* at *3.

In an illustration of the manner in which very broad laws empower the police to retaliate against speakers, the police declared an "unlawful assembly" and then carried out a mass arrest. *Id.* at *3–5. In fact, Lieutenant Timothy Sachs testified that officers have sole discretion to declare an assembly unlawful and that there are no policies or guidelines defining when it is appropriate to do so. *Id.* at *6.

After declaring an unlawful assembly, and giving orders to disperse, police blocked off points of egress and trapped the protesters in an intersection by marching toward it. *Id.* at *4–5. Then they made a mass arrest of everyone trapped in the intersection, even though the protesters complied with police commands. *Id.* at *5.

Ultimately, the district court issued a preliminary injunction. *Id.* at *17–18. One provision enjoins the police from declaring "an unlawful assembly . . . for the purpose of punishing persons for exercising their

constitutional rights to engage in expressive activity." *Id.* at *18.

One particularly common form of retaliation occurs when police arrest people for what has come to be called "contempt of cop." In these cases, a police officer has probable cause to believe an offense has occurred, but the suspect's speech, perceived as disrespectful, is the real reason the officer arrests her, rather than just citing and releasing her. Notably, *Police Magazine*, which bills itself as "the law enforcement magazine" and a "community for cops[,]" has a glossary of "cop slang" which defines "Contempt of Cop" as "the true underlying behavior of disrespect toward an officer leading to an expensive ticket or arrest for an offense that actually is a law violation." *Contempt of Cop*, POLICE MAGAZINE: COP SLANG, http://www.policemag.com/cop-slang/contempt-of-cop.aspx (last visited Dec. 19, 2017).

A 1999 review of the New Jersey State Police by then-New Jersey Attorney General John J. Farmer documented a common practice of arresting people for "contempt of cop":

> The single most common allegation among all the allegations reviewed was improper attitude and demeanor. This is true in law enforcement nationwide. We observed in several cases a problem which, for lack of a better term, may be called "occupational arrogance." The discussion of this problem is by no means unique to the New Jersey State Police. In fact, internal affairs detectives at one municipal police department, noting its prevalence, termed this phenomenon "contempt of cop." Simply put, it is the tendency for certain police

> officers to approach the public with an attitude that they, the officer, are in no way to be challenged or questioned. Among the cases we reviewed, several seem to illustrate this phenomenon.

FINAL REPORT OF THE STATE POLICE INTERVIEW TEAM 93–94 (1999).[4]

More recently, the Department of Justice found a systemic practice within the Newark Police Department of arresting people for contempt of cop: "The [Newark Police Department's] arrest reports and [internal affairs] investigations . . . reflect numerous instances of the [department's] inappropriate responses to individuals who engage in constitutionally protected First Amendment activity, such as questioning or criticizing police actions." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 13 (2014).[5] In one instance, for example, "an individual was arrested after he questioned officers' decision to arrest his neighbor." *Id.*

Similarly, in the Ferguson report, the Department of Justice found that police not only retaliated against demonstrators, but also that officers routinely made "contempt of cop" arrests:

> [O]fficers frequently make enforcement decisions based on what subjects say, or how they say it. Just as officers reflexively resort to arrest immediately upon noncompliance with

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[4] Available at https://pdfs.semanticscholar.org/649c/a046a3baca0f9ebafa2641b744c8a2b80e06.pdf

[5] Available at https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf

> their orders, whether lawful or not, they are quick to overreact to challenges and verbal slights. These incidents—sometimes called "contempt of cop" cases—are propelled by officers' belief that arrest is an appropriate response to disrespect.

UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25 (2015). Notably, the breadth of offenses contained in Feguson's municipal code made it easy to come up with charges: "These arrests are typically charged as a Failure to Comply, Disorderly Conduct, Interference with Officer, or Resisting Arrest." *Id.*

II. BROAD STATUTES AND ORDINANCES MAKE IT ALL TOO EASY FOR POLICE OFFICERS TO FIND PROBABLE CAUSE TO ARREST PEOPLE FOR SPEECH THEY DISLIKE.

If the existence of probable cause, standing alone, defeats a retaliatory arrest claim, the police will acquire vast discretion to punish dissent by rounding up protesters with whom they disagree. Many laws are so broadly written and prohibit so much activity that it is very easy for police to arrest people in retaliation for their speech. In various municipalities across the United States, it is illegal to wear saggy

pants,[6] to cross a street while viewing a cell phone,[7] and to have a barbecue in one's front yard.[8]

This Court has long recognized the threat of censorship posed by laws that endow the police with excessive discretion. In *City of Houston v. Hill*, the Court noted that an ordinance challenged in the case "criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily, yet only some individuals—those chosen by the police in their unguided discretion—are arrested." 482 U.S. 451, 466–67 (1987). The *Hill* Court concluded that vast discretion to arrest people for their speech eliminates the "'breathing space' that 'First Amendment freedoms need ... to survive.'" *Id.* at 467 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *see also Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J. concurring) ("This

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[6] Abbeville, Louisiana Code of Ordinances § 13-25 ("It shall be unlawful for any person in a public place or in view of the public to wear pants or a skirt in such a manner as to expose their underlying garments."); *see also* William C. Vandivort, Note, *I See London, I See France: The Constitutional Challenge to "Saggy" Pants Laws*, 75 BROOK L. REV. 667, 673 (2009) (cataloging similar saggy pants ordinances across the country).

[7] Revised Ordinances of Honolulu § 15-24.23, https://www.honolulu.gov/rep/site/ocs/roh/ROH_Chapter_15a21_28_.pdf ("No pedestrian shall cross a street or highway while viewing a mobile electronic device.").

[8] Berkeley, Missouri Code of Ordinances § 210.2250 ("Subject to certain exceptions mentioned hereinbelow, no person shall be permitted to barbecue or conduct outdoor cooking in front of the building line of any single-family dwelling, multi-family dwelling or commercial structure."); *see also* Pagedale, Missouri Code of Ordinances § 210.750(A).

ordinance . . . confers on police a virtually unrestrained power to arrest and charge persons with a violation.").

To be sure, the vagueness and overbreadth doctrines provide a partial antidote to laws that confer wide discretion to trench on protected speech. That said, courts cannot be in the business of invalidating every law that prohibits some protected conduct or could be worded more lucidly. "Invalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a last resort.'" *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 743 (1978) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Some laws are broad enough that the threat of retaliatory enforcement is quite serious, but not so broad as to warrant the "strong medicine" of facial invalidation.

A. Because Laws Affecting Protest Provide Probable Cause For Arrest In A Wide Range Of Circumstances, A Holding That Probable Cause Automatically Defeats A Retaliatory Arrest Claim Would Grant Police Massive Power To Arrest People For Disfavored Speech.

Protesters often violate broad statutes and ordinances that prohibit a wide range of activity, such as blocking sidewalks, unlawful assembly, violating noise ordinances, and disorderly conduct. Because these laws sweep in so much conduct, the police have probable cause to round up large numbers of protesters. If probable cause categorically defeats a retaliatory arrest claim, the police will wield the

power to arrest protesters for the very purpose of silencing disfavored messages.

1. Unlawful Assembly And Failure To Disperse

Under typical "unlawful assembly" ordinances, "officials can disperse a protest as long as they conclude that participants are at some point planning to engage in forceful or violent lawbreaking." John Inazu, *Unlawful Assembly as Social Control*, 64 U.C.L.A. L. Rev. 2, 7 (2017). Because these statutes grant police the power to disperse gatherings that could lead to force or violence, officers "are forced to rely on judgments and inferences about future acts" by protesters or bystanders. *Id.* at 6–7. In fact, some unlawful assembly statutes allow the police to disperse a protest where they believe the demonstrators will engage in an act that is illegal but nonviolent. *Id.* at 7.

The ability to declare an unlawful assembly based solely on predictions about the intent of the protesters, and in the absence of any observed violence or illegality, vests the police with massive discretion to shut down protests. For example, the California Penal Code defines "unlawful assembly" to include two or more people gathering for the purpose of committing an act that is unlawful, but non-violent: "Whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly." Cal. Penal Code § 407.

Unlawful assembly is a misdemeanor. Cal. Penal Code § 408.[9]

Police have used their discretion under unlawful assembly laws to "target citizens across the political spectrum, including civil rights workers, antiabortion demonstrators, labor organizers, environmental groups, Tea Party activists, Occupy protesters, and antiwar protesters." Inazu, *supra*, at 5.

2. Blocking Roads And Sidewalks

State and local governments often prohibit blocking roads, highways, and sidewalks. For example, the Code of the District of Columbia provides that "[i]t is unlawful ... [t]o crowd, obstruct, or incommode ... [t]he use of any street, avenue, [or] alley." D.C. Code § 22–1307(a) (2016).[10]

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[9] *See also* Idaho Code §§ 18-6404, 18-6405 (2017) (stating that the misdemeanor of unlawful assembly occurs "[w]henever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner . . ."); Iowa Code § 723.2 (2017) ("An unlawful assembly is three or more persons assembled together, with them or any of them acting in a violent manner, and with intent that they or any of them will commit a public offense. A person who willingly joins in or remains a part of an unlawful assembly, knowing or having reasonable grounds to believe that it is such, commits a simple misdemeanor.").

[10] *See also* Ga. Stat. § 16-11-43 (2017) ("A person who, without authority of law, purposely or recklessly obstructs any highway, street, sidewalk, or other public passage in such a way as to render it impassable without unreasonable inconvenience or hazard and fails or refuses to remove the obstruction after receiving a reasonable official request or the order of a peace officer that he do so, is guilty of a misdemeanor."); La. Rev. Stat. § 14:97 (2017) ("Simple obstruction of a highway of commerce is the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable

The police use these laws to arrest protesters. For example, following the police shooting of Alton Sterling, police arrested numerous protesters in Baton Rouge under Louisiana's obstruction of a highway law. Third Amended Complaint, *Tennart v. City of Baton Rouge*, No. 17-179-JWD-EWD, at 4-6 (M.D. La. filed July 13, 2017). The plaintiffs in the *Tennart* case allege that they were arrested on "the pretext that the protesters had violated a state law proscribing obstruction of highways and public roads." *Id.* at 3.[11]

3. Disorderly Conduct Ordinances

Police also arrest protesters under disorderly conduct ordinances. In *Lewis v. City of Tulsa*, "prolife activists were picketing an abortion clinic." 775 P.2d 821, 822 (Okla. Crim. App. 1989). Clayton Lewis and other activists stood 50-60 feet away from the entrance to the clinic and yelled at people entering that "it was murder. You should feel guilty about what you are doing." *Id.* For these lawful activities, Mr. Lewis was arrested and convicted under Tulsa's disorderly conduct ordinance. *Id.* The Oklahoma Court of Criminal Appeals ultimately reversed his conviction. *Id.*

4. Noise Ordinances

Noise ordinances typically impose limits on the amplification of sound. For example, the Chicago Municipal Code provides:

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waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult.")

[11] Roderick and Solange MacArthur Justice Center attorneys are among the counsel for the *Tennart* plaintiffs.

> No person on the public way shall employ any device or instrument that creates or amplifies sound, including but not limited to any loudspeaker, bullhorn, amplifier, public address system, musical instrument, radio or device that plays recorded music, to generate any sound, for the purpose of communication or entertainment, that is louder than average conversational level at a distance of 100 feet or more, measured vertically or horizontally, from the source.

Chicago Mun. Code § 8-32-070(a) (2017).[12]

Police often use noise and amplification provisions to arrest protesters. For example, Stephen Nylen, a devout Christian and Iraq war veteran, alleges in a case proceeding in the United States District Court for the Western District of Michigan that police have repeatedly threatened him with arrest under a noise and amplification ordinance. Second Amended Compl., *Nylen v. City of Grand Rapids*, No. 17-cv-716, at 5 (W.D. Mich. filed Nov. 20, 2017). Roughly half of these arrest threats occurred while Mr. Nylen was speaking about his faith on a public sidewalk near an abortion clinic. *Id.* at 5.

Similarly, in the aftermath of the shooting of Michael Brown in Ferguson, Missouri, three plaintiffs

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[12] *See also, e.g.*, Norfolk Code of Ordinances § 26-4 (2017) ("Operating, playing or permitting the operation or playing of any . . . bullhorn, megaphone, sound amplifier or similar device which produces, reproduces or amplifies sound in such a manner as to create noise disturbance across a real property line boundary or within a noise sensitive zone set forth in table I, 'Maximum Sound Pressure Levels,' shall constitute a violation of this section, unless allowed pursuant to an exception established by ordinance.").

were arrested for failure to comply with a police order during a peaceful protest that followed a candlelight vigil. First Amended Compl., *Powers v. City of Ferguson*, No. 16-cv-1299, at 4 (E.D. Mo. filed August 9, 2016). Three days later, another plaintiff was arrested for violating a noise ordinance while waiting for the police to release Antonio French, an alderman arrested during the protests. Powers was acquitted of the charges at trial. *Id.* at 5. In 2015, protesters demanding expanded Medicaid coverage were threatened with arrest for noise violations for singing outside the chambers of the Florida House of Representatives. *20 Arrested at North Carolina Legislature Protest in April Face Judge*, 11 ABC News (Jun. 8, 2017).[13]

B. Police Officers Exploit The Discretion Created By Broad Laws By Arresting Protesters With Whom They Disagree.

Police officers have used the discretion provided by broad statutes and ordinances to retaliate against speakers with whom they disagree. For example, in September of 2015, Michael Picard was protesting legally near a DUI checkpoint with a sign that read "Cops Ahead. Keep Calm and Remain Silent." Amy Wang, *Cops Accidentally Record Themselves Fabricating Charges Against Protester, Lawsuit Says*, Wash. Post (Sept. 20, 2016). He was also legally recording the police with his cell phone. *Id.* One of the officers slapped Picard's cell phone out of his hand and confiscated it. *Id.* The officer inadvertently allowed the cell phone camera to continue recording as he and other officers discussed charging Picard. *Id.*

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[13] *Available at* http://abc11.com/politics/20-arrested-at-nc-legislature-face-judge/772567/.

The transcript of the video provides a rare glimpse into how police officers (in this case, Master Sergeant Patrick Torneo, Sergeant John Jacobi, and Trooper John Barone) sometimes fabricate charges to retaliate against a protester. Torneo is heard saying: "Have that Hartford lieutenant call me, I want to see if he's got any grudges."[14] Barone asks: "You want me to punch a number [slang for opening an investigation] on this either way? Gotta cover our ass."[15]

The officers proceed to debate how to charge Picard, illustrating how broad statutes and ordinances often grant the police vast discretion to effectuate retaliatory arrests:

> Jacobi: So, we can hit him with reckless use of the highway by a pedestrian and creating a public disturbance, and whatever he said.
>
> Barone: That's a ticket?
>
> Jacobi: Two tickets.
>
> Barone: Yeah.
>
> Jacobi: That's a ticket with two terms, yeah. It's 53a-53-181, something like that for—

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[14] The full video is available here: https://www.washingtonpost.com/news/post-nation/wp/2016/09/20/cops-accidentally-record-themselves-fabricating-charges-against-protester-lawsuit-says/?utm_term=.2c20c7258090.

[15] *See supra* n.14.

Barone: I'll hit him with that, I'll give him a ticket for that.

Jacobi: Crap! I mean, we can hit him with creating a public disturbance.

Jacobi: All three are tickets-

Torneo: Yep.

Jacobi: We'll throw all charges three on the ticket.

Torneo: And then we claim that, um, in backup, we had multiple people, um, they didn't want to stay and give us a statement, so we took our own course of action. [16]

The Department of Justice Ferguson report also illustrates the phenomenon of police creatively charging people in order to retaliate against them for protected speech. In one case, "a police officer arrested a business owner on charges of Interfering in Police Business and Misuse of 911 because she objected to the officer's detention of her employee." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25 (2015). Indeed, the officer made the arrest after the business owner attempted to call the police chief, which "suggests that [the officer] may have been retaliating against her for reporting his conduct." *Id.* In another instance, an officer arrested a man for violating an extremely

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[16] *See supra* n.14.

broad "Manner of Walking in Roadway" ordinance because the man cursed at the officer. *Id.*

Similarly, in *Allee v. Medrano*, this Court found a "persistent pattern of police misconduct," in the enforcement of Texas statutes, including an unlawful assembly law, against activists seeking to organize a farmworkers' union. 416 U.S. 802, 815 (1974). The Court noted that the district court found that "the defendants selectively enforced the unlawful assembly law ... treating as criminal an inoffensive union gathering...." *Id.* at 808 (citation omitted).

The *Ahmad* decision regarding the September 2017 protests in St. Louis provides a more recent illustration of a police officer's broad discretion to effectuate arrests under unlawful assembly laws. The court noted that, in St. Louis, "an individual officer can decide, in his or her discretion, to declare an unlawful assembly, and there are no guidelines, rules, or written policies with regard to when an unlawful assembly should be declared." 2017 WL 5478410, at *6.

In *Ford v. City of Yakima*, 706 F.3d 1188, 1191 (9th Cir. 2013), an officer arrested and jailed a motorcyclist under a noise ordinance. The officer decided to make the arrest because he became irritated with the motorist for (lawfully) talking back. *Id.* at 1190–91. Prior to the arrest, the officer made a series of statements that included, "[i]f you run your mouth, I will book you in jail for it. Yes, I will, and I will tow your car," and "[i]f you have diarrhea of the mouth, you will go to jail." *Id.* The officer also said: "A lot of times we tend to cite and release people for [noise ordinance violations] or we give warnings. However ... you acted a fool ... and we have discretion whether we

can book or release you. You talked yourself—your mouth and your attitude talked you into jail." *Id.*

CONCLUSION

In protests against the police, some see courage and dissent, while others see insult, exaggeration, and ingratitude. The freedom of expression lives and breathes in that clash of ideologies, which reflect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The present conflict of ideas must be resolved, as others in our history have been, through public discourse—not through retaliatory arrests made to silence dissent. For that reason, this Court should reverse the judgment below.

Respectfully submitted,

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